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IN THE

Supreme Court of the United States

LEGAL SERVICES FOR NEW YORK CITY, *et al.*,

Petitioners,

—v.—

LEGAL SERVICES CORPORATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Second Circuit erred by holding, as it did when it issued its first opinion in this case in 1999, that the appropriate test for evaluating the constitutionality of LSC's "program integrity" rule, as applied to three legal service organizations who receive or want to receive federal funding, is whether the rule leaves the organizations "adequate alternative channels for protected expression."

PARTIES INVOLVED

The following are the parties to this case:

> Legal Services for New York City, South Brooklyn Legal Services, and Farmworker Legal Services of New York (Petitioners)
>
> Legal Services Corporation (Defendant)
>
> United States of America (Defendant)

The following additional parties participated in the case before the Second Circuit Court of Appeals:

> Community Service Society of New York, Inc.; Centro Independiente de Trabajadores Agricolas; Peggy Earisman; Lauren Shapiro; Andrew Connick; and the New York Foundation (Plaintiff-Cross-Appellants)

CORPORATE DISCLOSURE STATEMENT

Defendant Legal Services Corporation is a federally chartered corporation. It is not publicly held and does not issue stock. It has no parent companies or non-wholly owned subsidiaries.

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CITATIONS OF RELEVANT OPINIONS

The opinion of the Court of Appeals (App. 1a-35a) is reported at 462 F.3d 219 (2d Cir. 2006). The decisions of the district court (App. 36a-46a and 47a-145a) are reported at 356 F. Supp. 2d 267 (E.D.N.Y. 2005) and 349 F. Supp. 2d 566 (E.D.N.Y. 2004).

JURISDICTIONAL STATEMENT

The Second Circuit Court of Appeals issued its judgment on September 8, 2006. Plaintiffs filed their petition for rehearing and rehearing en banc on September 29, 2006. The Court of Appeals denied Plaintiffs' petition in an order filed on December 28, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional provisions, statutes and regulations are involved in this case:

1. United States Constitution, Amendment 1.

2. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, 110 Stat. 1321, H.R. 3019 (April 26, 1996) (App. 149a-158a).

3. 45 C.F.R. § 1610.8 (App. 169a-170a).

STATEMENT OF THE CASE

This case presents Petitioners' renewed attempt to put before this Court an issue that the Court has already declined to review. It is the latest iteration of a years-old series of challenges to Congress's power to focus the federal legal services program administered by Respondent Legal Services Corporation ("LSC") by conditioning the award of federal funds to grantees on compliance with certain federal restrictions.

The LSC Program

LSC is a non-profit government-funded corporation created by the Legal Services Corporation Act of 1974 "for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." 42 U.S.C. § 2996b(a). Under this mandate, LSC makes and administers grants to local organizations that provide free legal assistance to indigent clients. From the outset of the LSC program, Congress has exercised its power to control how LSC grantees use federal funds. *See id.* at § 2996f(b) (prohibiting use of LSC funds in, *inter alia*, most criminal proceedings, political activities, and litigation involving nontherapeutic abortion, desegregation, or military desertion).

Despite its success in providing legal services for indigent clients, LSC has been surrounded by controversy since it was founded. *Velazquez v. Legal Servs. Corp.*, 985 F. Supp. 323, 327 (E.D.N.Y. 1997) (*"Velazquez I"*). Over the years, members of Congress and members of the public have criticized LSC for what they perceived to be

controversial and overly political activities on the part of some LSC grantees. As a result, funding for the federal legal services program has been in jeopardy since 1980, when LSC began to depend on annual appropriations bills for survival. *See Legal Aid Soc'y of Hawaii v. Legal Servs. Corp.*, 961 F. Supp. 1402, 1406 (D. Haw. 1997).

The 1996 Act

The congressional restrictions at issue were introduced in 1996, as part of Congress's effort to save the federal legal services program by limiting its scope. *See* Omnibus Consolidated Rescissions and Appropriations Act ("OCRAA") of 1996, Pub. L. No. 104-134, § 504, 110 Stat. 1321, 1321-53-56 (1996) ("the 1996 Act") at § 504 (App. 149a-158a). These restrictions (the "Substantive Restrictions"), which were implemented by regulations promulgated by LSC, limit the types of representations that LSC grantees may undertake, prohibiting grantees from engaging in certain "restricted activities" even with private funds. *See id.*; 45 C.F.R. § 1609 *et seq.* Among these implementing regulations is the "program integrity rule," which LSC promulgated to allow grantees to vindicate their constitutional rights to engage in restricted activities. *See* 45 C.F.R. § 1610.8 (App. 169a-170a). The program integrity rule permits grantees to establish controlled affiliates outside the LSC program that are free to engage in restricted activities, so long as the grantee does not provide LSC funding to the affiliate and maintains adequate legal, physical and financial separation from it.

Petitioners' First Round of Challenges

The *Velazquez* Plaintiffs asserted their initial challenge to the restrictions in 1997. The district court denied plaintiffs' motion for a preliminary injunction (*Velazquez I*, 985 F. Supp. at 344), and plaintiffs appealed the decision to the Court of Appeals for the Second Circuit. The Second Circuit upheld the validity of all but one (the "suit-for-benefits" limitation) of the congressional restrictions, as well as the program integrity rule. *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 773 (2d Cir. 1999) ("*Velazquez II*"). Relying primarily on three decisions of this Court (*Rust v. Sullivan*, 500 U.S. 173 (1991), *FCC v. League of Women Voters*, 468 U.S. 364 (1984), and *Regan v. Taxation with Representation*, 461 U.S. 540 (1983)), the Second Circuit held that "in appropriate circumstances, Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression." *Velazquez II*, 164 F.3d at 766. The Court further held, as a facial matter, that the program integrity rule allowed LSC grantees adequate alternative channels to establish controlled affiliates. *Id.* at 766-67.

All parties petitioned this Court for certiorari. The Court granted certiorari on the limited issue of the "suit-for-benefits" limitation, and affirmed the Second Circuit's holding that it was unconstitutional. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) ("*Velazquez III*"). One week after issuing that opinion, the Court denied Plaintiffs' petition for certiorari as to Plaintiffs' rejected challenges to the program integrity rule and the remaining Substantive

Restrictions. *Velazquez v. Legal Servs. Corp.*, 532 U.S. 903 (2001).

The Instant Challenge

In December 2001, ten months after the decision in *Velazquez III*, a new group of plaintiffs (the *Dobbins* Plaintiffs) filed a complaint against LSC in the Eastern District of New York purporting to assert facial and as-applied challenges to the program integrity rule and several of the Substantive Restrictions. This new case was consolidated with the *Velazquez* case, and both sets of plaintiffs moved for a preliminary injunction against enforcement of the restrictions. The district court—applying an "undue burden" test in which it compared the governmental interests served by the program integrity rule with the burdens imposed on the plaintiffs—held the rule to be "unduly burdensome" and preliminarily enjoined LSC from enforcing the program integrity rule as written. *Velazquez v. Legal Servs. Corp.*, 349 F. Supp. 2d 566, 598-612, 613 (E.D.N.Y. 2004) ("*Velazquez IV*"), *modified*, 356 F. Supp. 2d 267 (E.D.N.Y. 2005).

On appeal, the Second Circuit reversed the district court's grant of a preliminary injunction, holding the district court had erred in applying the "undue burden" standard to the plaintiffs' claims. *Brooklyn Legal Servs. Corp. B v. Legal Servs. Corp.*, 462 F.3d 219 (2d Cir. 2006) ("*Velazquez V*"). Finding that Plaintiffs' "as-applied challenge is, in all relevant respects, on all fours with its facial counterpart in Velazquez II" (*id.* at 228), the Court held that the district court "should have used the adequate alternative test we articulated in Velazquez II" (*id.* at 232), and remanded the

case for further proceedings consistent with its opinion (*id.* at 236).[1] Contrary to Petitioners' contention, the Second Circuit's decision did not hold that "a theoretical option" to establish an affiliate was sufficient (Pet. 12); it instructed the district court to determine "as a factual matter" whether the program integrity rule leaves plaintiffs with "adequate alternative channels for protected expression." *Velazquez V*, 462 F.3d at 231. Petitioners now contend that the Second Circuit's decision was in error.

[1] The Second Circuit found that, far from "[h]ewing closely to the Second Circuit's first opinion in *Velazquez*," as Petitioners contend (Pet. 11), the district court had "either misunderstood or missed" the "guidance on the law" set forth in Second Circuit's opinion. *Velazquez V*, 462 F.3d at 221.

ARGUMENT

Certiorari is not warranted in this case. The Petitioners' purported "as applied" challenge to LSC's program integrity rule is indistinguishable from the facial challenge as to which this Court previously denied review. Because none of the Petitioners ever attempted to establish an affiliate, the record in this case is insufficiently developed to provide a concrete set of facts on which to decide the issue presented. In any event, the Second Circuit's decision was entirely consistent with this Court's precedent and provides no conflict meriting this Court's review.

I. This Case Presents the Same Issues as *Velazquez II*

The *Velazquez II* Court considered (and rejected) precisely the same arguments Petitioners now advance: that the program integrity rule is too expensive and inflicts unwarranted programmatic and administrative costs on grantees. The *Velazquez II* Court also considered essentially the same record that Petitioners advance now. Although as-applied challenges typically require greater factual development than do facial challenges, in this case Petitioners' "as-applied" challenge was based on essentially the same facts and arguments as those presented in support of the earlier facial challenge. Because none of the Petitioners entered into an affiliate relationship or attempted to enter into an affiliate relationship, Petitioners' renewed attempt to put before this Court an issue as to which the Court has already denied certiorari should be rejected.

Petitioners' assertion that the "District Court carefully compiled an uncontested record of the costs and burdens of compliance" (Pet. 10-11) misleadingly suggests the existence of an actual record and underplays the district court's role in creating the "record" in this case.

Soon after this Court's decision in *Velazquez III*, the lawyers for the *Velazquez* Plaintiffs announced their intention to pursue the as-applied challenge contemplated by *Velazquez II*. *See Velazquez II*, 164 F.3d at 767 ("Any grantee capable of demonstrating that the 1996 restrictions in fact unduly burden its capacity to engage in protected First Amendment activity remains free to bring an as-applied challenge to the 1996 Act."). At a status conference in June 2001, the district court asked Plaintiffs to submit a brief addressing whether any of them had standing to raise an as-applied challenge. After six months, the lawyers for the *Velazquez* Plaintiffs filed a new suit on behalf of a new group of Plaintiffs (*Dobbins v. LSC* or the "Dobbins action"), filed an unopposed motion to consolidate the *Dobbins* action with the *Velazquez* action, and moved for a preliminary injunction in both cases. The Plaintiffs' moving papers did not point to any attempt to enter into an affiliate relationship by any of the three legal service program plaintiffs (i.e., Legal Services of New York ("LSNY"), a current grantee; South Brooklyn Legal Services ("SBLS"), a current subgrantee; and Farmworkers Legal Services ("FWLS"), a program that decided not to apply for funding after the 1996 Act came into law). Rather, Plaintiffs predicated their as-applied challenges on the fact that the three program plaintiffs had "considered" forming affiliate relationships but decided against it. SF ¶¶ 28-29, 40-42, 62-68, App. 232a-233a, 234a, 237a-239a.

Because none of the Plaintiffs had entered into an affiliate relationship or attempted to enter into an affiliate relationship, LSC opposed the Plaintiffs' motion for a preliminary injunction and moved to dismiss the purported as-applied challenges for lack of standing and for ripeness. LSC argued that the Plaintiffs were merely reiterating the facial arguments already rejected by the *Velazquez* Courts. LSC's papers also established that in the years since the rule was implemented, several grantees had been able to establish affiliate relationships. SF ¶ 11, App. 226a; *see also* SF ¶¶ 8-10, App. 226a.[2]

In 2003, during oral argument on the Plaintiffs' motion for a preliminary injunction, the district court suggested that Plaintiffs rely on a 1997 proposal by Queens Legal Services Corporation ("QLSC")—a non-party to the lawsuit whose proposal was rejected by LSC because it provided for virtually none of the requisite separation[3]—to

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[2] While LSC does not keep track of how many of its grantees have established affiliate relationships with unrestricted legal service providers, as of May 2002, LSC was aware of at least seven unobjectionable affiliations. SF ¶¶ 9-11 *contra* Pet. 8. From public sources, LSC has reason to believe that many other grantees have been able to enter into compliant affiliations as well.

[3] QLSC, an LSC subgrantee under the umbrella of petitioner LSNY, submitted a proposal to LSC to create an affiliate organization with legal and bookkeeping separation from QLSC but virtually no separation of offices, equipment, or staff. SF ¶¶ 22, 26, App. 231a-232a. LSC had informed QLSC that that proposal would not satisfy the program integrity rule. LSC letter

fashion a proposal that would give them standing to challenge the program integrity rule. Recognizing the facial insufficiency of QLSC's proposal, the district court encouraged the Plaintiffs to submit a revised proposal to LSC.

In April and May 2003, Plaintiffs modified the QLSC proposal to add additional details, and ultimately submitted a revised proposal (the "Clarified Proposal"). SF ¶ 26, App. 232a; *see* App. 178a-186a. Notably, Plaintiffs submitted a single proposal for SBLS, FWLS, and LSNY, making no distinction between the entities, even though the organizations are very different in size and scope.

LSC considered and rejected the Clarified Proposal for essentially the same reasons as the original QLSC proposal, namely, that the Clarified Proposal on its face provided for absolutely no separation of offices, equipment, or personnel, but relied instead on the "mere book-keeping separation" that the program integrity rule explicitly declares insufficient. SF ¶ 27, App. 232a; *see* 45 C.F.R. § 1610.8(a)(3), App. 169a; *see also* App. 205a-221a.

Nevertheless, the district court held that Plaintiffs had standing to raise their as-applied claims based on LSC's rejection of their Clarified Proposal. *Velazquez IV*, 349 F. Supp. 2d at 598. In so holding, the district court did not address LSC's argument that the submission of a facially invalid proposal could not confer standing to assert a ripe as-

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to LSNY, dated September 10, 1997 at 2, incorporated into SF ¶ 24, App. 231a.

applied challenge. Thus, when LSC concluded that the Clarified Proposal would not pass muster, LSC was not required to weigh the various factors in the rule or "apply" it. This proposal was simply a vehicle for making the same generalized arguments this Court declined to review as a facial matter.

The district court enabled Plaintiffs to mount an as-applied challenge based on a court-created, fictional record. In reality, the only additional "evidence" in the record since *Velazquez II* is a series of declarations from grantees in the parties' stipulated facts upon which Petitioners rely heavily. *See* Pet. 7-8. These declarations are not based on any affiliation that has ever been created, but are based on Plaintiffs' beliefs concerning burdens the program integrity rule *might* impose on them. These hypothetical affiliations are based on the assumption that the program integrity rule (or LSC's enforcement of it) requires greater separation of personnel, equipment, and office space than it actually requires, thus inflating the burdens on Petitioners. At least two of these assumptions are false.

First, the burdens postulated by Petitioners are all based on the assumption that in a hypothetical affiliation, the petitioner would share absolutely no physical space with the unrestricted entity. *See* Pet. 7 (citing SF ¶ 25, App. 231a (QLSC considered creating an "affiliate which operated in a physically separate locality"), ¶ 41, 234a (SBLS considered an "affiliate which operated in a physically separate locality")); *see also* Pet. 6. But complete physical separation is not required by the rule. 45 C.F.R. § 1610.8(a)(3)(iii), App. 169a; *see e.g.*, LSC Office of Legal Affairs External

Op. No. EX-2003-1008 (May 8, 2003), App. 200a (Section 1610 may allow for "[a]ffiliates operating on separate floors" of same physical premises or "having offices on the same floor (perhaps with some shared space, such as a library), but with separate entrances for each organization"). Petitioners could reduce the cost of creating an affiliate by sharing *some* space.[4]

Second, the Petitioners' calculation of the costs of affiliating is based on the assumption that the LSC grantee and the unrestricted affiliate share at most one attorney. SF ¶ 25 (QLSC proposes sharing no staff), ¶ 41 (SBLS proposes sharing one attorney), ¶ 63 (FWLS proposing sharing no staff), App. 231a-232a, 234a, 238a; *see also* Pet. 6-7 (stating hypothetical, staff-related burdens). This degree of staff separation also is not required by LSC. Since attorney overlap of up to 10% would not necessarily violate the program integrity regulation (*see* LSC Office of Legal Affairs External Op. No. EX-2003-1008, App. 201a), SBLS which has 34 attorneys (SF ¶ 39, 234a), could share as many as 3 attorneys with an unrestricted affiliate. LSNY, a far

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[4] Petitioners repeatedly contradict themselves, reading the regulation correctly in one breath and then discounting it in the next. *See, e.g.*, Pet. 8 ("Section 1610.8 does not literally require physical separation of entire offices and staff (the regulation's text insists merely on legal separation, 'physical and financial separation' and 'separate personnel'")) *contra* Pet. 9 (criticizing LSC for rejecting Clarified Proposal, which proposed that affiliates "operate in one physical location" without any more detail as to how affiliates located on the same premises would actually maintain physical separation (Clarified Proposal ¶ 8, App. 185a)).

larger organization, could share a far greater number. This additional sharing of staff would also significantly reduce the cost of creating an affiliate.

Petitioners also argue that the rule's separation requirement would impose crippling administrative and programmatic burdens on them. Pet. 7-8. But Petitioners have never attempted any measures to minimize these types of burdens. For example, a grantee may well be able to use a single coordinating attorney to facilitate communication between the grantee and the affiliate. On the record before the district court, there was no information concerning the effectiveness of such a measure. That is precisely the type of real world data required to assert an as-applied challenge.

In reality, Petitioners have not entered into an affiliate relationship, attempted to enter into an affiliate relationship, or submitted a genuine proposal to LSC because they do not want as-applied relief limited to a finite number of grantees in specifically defined circumstances. They want the same sweeping invalidation of the rule that they sought and were denied in *Velazquez II*.[5] With the district court's help,

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[5] Petitioners do not hide their true motive, but rather blatantly attempt to take a second bite at the apple on their facial challenge to the program integrity rule. For instance, their reasons for granting certiorari include such non-particular grounds as that the regulations "severely impede the ability *of more than one hundred legal programs* across the United States" to use non-federal funds and "threaten the viability and proper operation of newly emerging cooperative ventures between the public and private sectors, and between the state and federal governments" (Pet. 13) (emphasis added), and that "unless the [Second Circuit's] opinion is

Petitioners have brought a facial challenge in as-applied clothing. Having declined to review Petitioners' facial challenge once, the Court should decline to do so again.

Moreover, review of *Velazquez V* would be premature as the Second Circuit did not decide the merits of this case. Petitioners argue that the Second Circuit "misconstrued the notion of an adequate alternative channel of communication." Pet. 25. Petitioners contend that the alternative offered by the program integrity rule is "extremely" (*id.* at 16) and "massively" burdensome (*id.* at 25, *see also id.* at 19), and "impose[s] a massive deterrent – if not an outright prohibition – on the unrestricted use of state, local and private funds" (*id.* at 12), and therefore presents merely "a theoretical option" (*id.*). For this reason, Petitioners argue, the Second Circuit erred in vacating the preliminary injunction. But Petitioners mischaracterize the nature of the Court's decision. The Court did not make any determination as to whether the program integrity rule provides Petitioners with an "adequate alternative channel" of expression. Rather, the Second Circuit ruled on the appropriate standard for this determination and remanded the case to the district court for determination of whether "as a factual matter" the program integrity rule satisfies this standard, as-applied to Petitioners. *Velazquez V*, 462 F.3d at 231. Since the district court has not made this determination, a review of Petitioners' claims by this Court would be premature.

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reviewed, the federal government's power to use funding conditions to censor disfavored speech will be dramatically enhanced" (*id.* at 14).

II. The Second Circuit's Decision was Consistent with Supreme Court Precedent

Petitioners assert several arguments as to why the Second Circuit's decision was in error. Although Petitioners attempt to frame these arguments as turning on decisions this Court has issued since it declined to hear this case in 2001, (*see* Pet. 16 (contending Second Circuit decision "[c]ontravenes *United States v. American Library Association*"); 20 (contending decision "[c]ontravenes" *Rosenberger v. Rector and Visitors of the University of Virginia* (and *Velazquez III*))), Petitioners are actually challenging the "adequate alternative channel" standard the Second Circuit articulated in *Velazquez II*. When reduced to their essence, Petitioners' arguments are that the adequate alternative standard is inappropriate because restrictions attendant on the receipt of federal funds satisfy the unconstitutional conditions doctrine only if (1) the resulting burden is "insubstantial" and (2) those restrictions constitute the least restrictive means of achieving the government's goals. These arguments misconstrue the holdings of this Court.

A. The Adequate Alternative Channel Test is Derived From and Consistent with This Court's Decisions on Unconstitutional Conditions

As the Second Circuit stated when it first considered the claims asserted by the *Velazquez* Petitioners in 1999, "[t]hree Supreme Court cases provide the framework for evaluating plaintiffs' unconstitutional conditions claim."

Velazquez II, 164 F.3d at 765 (discussing *Rust v. Sullivan*, 500 U.S. 173 (1991); *FCC v. League of Women Voters*, 468 U.S. 364 (1984); and *Regan v. Taxation with Representation*, 461 U.S. 540 (1983)).

In *Taxation with Representation* ("*TWR*"), 461 U.S. 540, a not-for-profit organization known as TWR challenged an Internal Revenue Code provision that forbade tax-exempt organizations from engaging in lobbying. TWR claimed that the provision violated the First Amendment by forcing it to choose between receiving tax-deductible status and exercising its right to engage in lobbying. The Supreme Court rejected this claim. After noting that the tax-exempt status was a federal subsidy equivalent to a cash grant, the Court held that the provision did not place an unconstitutional condition on TWR's right to free speech because the Internal Revenue Code allowed TWR to pursue its lobbying efforts through an affiliated, non-tax-exempt organization. *Id.* at 544. In so holding, the Court acknowledged that "TWR would, of course, have to ensure that the [tax-exempt] organization did not subsidize the [affiliate]" so that public funds were not spent "on an activity Congress chose not to subsidize." *Id.*

In *League of Women Voters*, 468 U.S. 364, the second case of the Supreme Court trilogy, the Court affirmed this principle by striking down a statute that did not provide grantees an alternative channel of expression. In that case, a radio station challenged a federal law prohibiting radio stations that received federal funding from editorializing. The Court held that the statute violated the First Amendment, but indicated that, if "Congress were to adopt a revised

version of [the law] that permitted . . . stations to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid under the reasoning of" *TWR*. *Id.* at 400. As the Court later elaborated, "[s]uch a scheme would permit the station 'to make known its views on matters of public importance through its nonfederally funded, editorializing affiliate without losing federal grants for its noneditorializing broadcast activities.'" *Rust*, 500 U.S. at 197 (quoting *League of Women Voters*, 468 U.S. at 400).[6]

In *Rust*, 500 U.S. 173, the third case, the Supreme Court upheld federal regulations that conditioned receipt of "family planning" funds on recipients' agreement not to advance abortion as a method of family planning. The Supreme Court rejected the various claims asserted by the plaintiffs, among them a claim that the regulations imposed an unconstitutional condition on the grantees' exercise of

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[6] Plaintiffs cite *League of Women Voters*, 468 U.S. at 398-99, for the proposition that the "government cannot burden speech without any legitimate reason for doing so . . . even when the speech restriction takes the form of a condition on the receipt of federal funds." Pet. 15. But, the Court did not apply the traditional First Amendment analysis to which Petitioners point to the government's argument that the restriction was a permissible exercise of the spending power. In the latter analysis, the Court noted that the availability of an affiliate organization would make the restriction "plainly . . . valid," suggesting that the sole determining factor is whether the grantee has an alternative avenue for the restricted activity. *Id.* at 400.

their First Amendment rights. The Court held that the regulations did not impose an unconstitutional condition because they "[did] not force the . . . grantee to give up abortion-related speech; they merely require[d] that the grantee keep such activities separate and distinct from the [federally-subsidized] activities." *Id.* at 196. In so holding, the Court upheld the constitutionality of a program integrity rule that is essentially identical to the rule in this case.[7]

"Taking these cases together," the Second Circuit held, in *Velazquez II*, that "in appropriate circumstances, Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression." *Velazquez II*, 164 F.3d at 766. Seven years later, when confronted with the "as-applied" claims asserted by the *Velazquez* and *Dobbins* Plaintiffs, the Second Circuit concluded that plaintiffs' "as-applied challenge is, in all relevant respects, on all fours with its facial counterpart in Velazquez II." *Velazquez V*, 462 F.3d at 228. Since its prior decision in *Velazquez II* remained the controlling case, the Second Circuit held that the district court "should have used the adequate alternative test we articulated in Velazquez II," not the "undue burden" standard, to evaluate Petitioners' as-

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[7] In *United States v. American Library Association ("ALA")*, 539 U.S. 194 (2003), this Court's most recent unconstitutional conditions decision, a four-judge plurality specifically reaffirmed the central holding of *Rust* that the government is "entitled to define the limits" of federal programs by "insisting that public funds be spent for the purposes for which they were authorized." *Id.* at 211 (quoting *Rust*, 500 U.S. at 196).

applied claims. *Id.* at 232. Concluding that "[t]he district court is in a better position to make this fact determination," the Court decided to "leave it to that court to do so in the first instance utilizing the correct standard," and remanded the case. *Id.* at 231.

B. The Unconstitutional Conditions Doctrine Does Not Support Application of An Undue Burden Test

Although petitioners do not expressly argue that the program integrity rule should be evaluated under an undue burden standard, they claim that the Second Circuit erred by "refus[ing] to weigh the massive burden on speech imposed by the requirement of physically separate facilities against the proffered governmental interests." Pet. 19-20. Petitioners argue that in applying the unconstitutional conditions doctrine, "the Court has consistently drawn a bright line between government's power to insist that funding recipients respect limits on the use of federal funds, and the government's power to control a grantee's private expression paid for by its own separately raised funds." *Id.* at 17. Thus, Petitioners claim, while the Court has upheld restrictions imposing "insubstantial burdens" on privately funded speech, it has never upheld restrictions imposing "substantial burdens" on such speech, except where the speech at issue was deemed government speech. *Id.*; *see* 17-21 (*comparing TWR*, 461 U.S. 540; *League of Women Voters*, 468 U.S. 364; and *ALA*, 539 U.S. 194, *with Rust*, 500 U.S. 173). Since the speech at issue in this case is private speech and not government speech, Petitioners contend, the burdens are too substantial for the program integrity rule to be upheld. In

support of this argument, Petitioners take various portions of these decisions out of context in an attempt to recast the "burdensomeness" of the restriction as the determining factor in the Court's decisions. This attempt to recast this doctrine is not persuasive.

First, Petitioners cite *TWR* as a case that turned on the "ease with which a 'subsidized' speaker could establish an affiliate organization" (Pet. 17), arguing that Justice Blackmun's concurrence suggested that "if formation of the unrestricted affiliate were unduly burdensome, the statute would be unconstitutional" (*id.* at 18). To the contrary, while the Court noted that a requirement that TWR form a separate entity for lobbying was "not unduly burdensome" (*TWR*, 461 U.S. at 544 n.6), and Justice Blackmun expressed a concern about the scope of additional restrictions (*id.* at 553-54), the *TWR* Court acknowledged that further regulations would be necessary to prevent the tax-exempt deductions received by the subsidized organizations from cross-subsidizing the lobbying conducted by the unsubsidized affiliates (*id.* at 544). But since the *TWR* statute did not include specific program integrity regulations, and TWR did not claim that it was "unable" to operate within the dual structure, the Court did not decide what level of separation could be required. *Id.* at 544 n.6.

Petitioners similarly mischaracterize *League of Women Voters*. Petitioners concede that the Court held, in that case, that a requirement that the radio station create a separate entity to editorialize with nonfederal funds would not violate the First Amendment. Pet. 18. But Petitioners then seize on the phrase "use the station's facilities" to

suggest that a "regulation that required a separate transmitter in a separate physical space staffed by separate personnel would have imposed an undue – and therefore, unconstitutional – burden on privately funded speech." *Id.* Since the *League of Women Voters* Court did not consider a specific program integrity rule or the degree of separation between the subsidized and unsubsidized entity, Petitioners simply speculate about the meaning of the Court's dictum.[8]

Finally, Petitioners contend that this Court's most recent unconstitutional conditions case, *ALA*, 539 U.S. 194, "treated as dispositive the minimal burden the statute imposed," and suggested that an as-applied challenge to the statute would be evaluated according to an undue burden-type balancing test. Pet. 19. In that case, the plurality upheld a federal statute providing that public libraries may not receive federal funding to provide Internet access unless they install software to block obscenity and child pornography. Although several of the opinions filed in that case do refer to the burdens imposed by the statute, they refer to the burdens on library patrons to obtain the censored information, not the burdens on the libraries themselves to establish alternative channels of expression (*see ALA*, 539 U.S. at 209; 214-15

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[8] Later, in another section of their Petition, Petitioners blatantly misrepresent this Court's opinion in *League of Women Voters*, claiming that "the Court explicitly rejected the notion that Congress could require broadcasting stations to editorialize in physically separate facilities to prevent confusion over the scope of federal funding." Pet. 22. As discussed above, the Court did not address what degree of separation would be appropriate or constitutional.

(Kennedy, J., concurring); 219-20 (Breyer, J., concurring); 234-35 (Souter, J., dissenting)), presumably because the Court questioned whether public libraries had First Amendment rights in the first place (*id.* at 210-11). Thus, a suggestion that a balancing of the burdens and interests might be appropriate in that case does not support Petitioners' contention that such a test would apply in this case, where the relevant question is whether the program integrity rule precludes *grantees* from establishing "alternative channels of expression." Thus, none of the cases Petitioners cite support their contention that the level of burden is the determining factor in an unconstitutional conditions case.

Unable to escape the fact that this Court, in *Rust*, upheld a program integrity rule nearly identical to the one at issue in this case, Petitioners argue that *Rust* is not applicable because the doctors in *Rust* were deemed to be delivering government speech. Pet. 20-21. Thus, Petitioners argue, the Second Circuit erred in relying on *Rust*. *Id.* at 21. But, as every relevant Supreme Court case since *Rust* has explained, this "government-as-speaker" analysis applies only when the courts evaluate viewpoint-based restrictions on speech. *See ALA*, 539 U.S. at 213 n.7 (explicitly rejecting Petitioners' argument, as set forth in Justice Stevens' dissent); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829-30, 834 (1995) ("It does not follow . . . [from *Rust*] that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.")); *Board of Regents v. Southworth*, 529 U.S. 217, 234-35 (2000) (explaining that government as speaker analysis is necessary

to evaluate viewpoint-based restrictions on speech). In fact, in *ALA*, a plurality of this Court specifically rejected Petitioners' interpretation of *Velazquez III*: "*Velazquez* held only that that *viewpoint-based restrictions* are improper 'when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers." *ALA*, 539 U.S. at 213 n. 7 (quoting *Rosenberger*) (emphasis modified). Since the restrictions at issue in this case are viewpoint-neutral, this distinction is irrelevant.

C. The Unconstitutional Conditions Doctrine Does Not Require that Congress Employ the Least Restrictive Alternative

Petitioners argue, in various ways and in various sections of their Petition, that the program integrity rule is unconstitutional because LSC and the government could have achieved the goals of avoiding both subsidization and the appearance of subsidization of restricted activities through less restrictive means. Pet., *e.g.*, 15 (Second Circuit erred "by failing to require LSC to offer any justification for imposing a massive burden on privately funded speech"); 26 (describing physical separation requirement as "nothing short of overkill, akin to 'burn[ing] the house to roast the pig'") (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)). In support of this argument, Petitioners refer to unrelated constitutional and statutory schemes that allow for less separation between subsidized and restricted activities. Pet. 23 (Establishment Clause does not require physical separation between government-funded and religious activities); 24 (Faith-Based Initiative only requires that

government-funded and religious activities take place in different rooms or at different times). *See also* Pet. 22 (Court's opinion in *League of Women Voters* suggested in *dicta* that physical separation between federally-funded programming and privately funded editorials would not be necessary).

Petitioners' argument ignores the fact that, when, as here, a restriction is a condition on the receipt of a federal subsidy, not an affirmative restriction, the government need not apply the least restrictive means.[9] As this Court has recognized, "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Maher v. Roe*, 432 U.S. 464, 475 (1977).

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[9] Notably, none of the cases Petitioners cite involve conditions on federal subsidies. *See Republican Party v. White*, 536 U.S. 765 (2002) (holding Minnesota Supreme Court's canon of judicial conduct prohibiting judicial candidates from announcing views on disputed legal and political issues violates the First Amendment); *Mitchell v. Helms*, 530 U.S. 793 (2000) (holding federal program under which federal funds used to buy educational materials lent to religious schools did not violate Establishment Clause); *Capitol Sq. Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (holding State would not violate Establishment Clause by permitting private party to display religious symbol in traditional public forum); *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (holding ordinance prohibiting homeowners from displaying most signs on property violated First Amendment); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (holding requirement that mall allow individuals to exercise speech on premises did not violate mall owner's First Amendment or property rights).

"Constitutional concerns are greatest when the State attempts to impose its will by force of law." *Id.* at 476. By contrast, "subsidies are just that, subsidies. The recipient is in no way compelled to operate a [subsidized] project; to avoid the force of the regulations, it can simply decline the subsidy . . . By accepting [federal] funds, a recipient voluntarily consents to any restrictions placed on any matching funds or grant-related income." *Rust*, 500 U.S. at 199 n.5.

Thus, when the Supreme Court has considered restrictions associated with governmental subsidies, it has not evaluated those restrictions under "the exacting means-end scrutiny this Court requires when a regulation imposes content-based restrictions on private speech." Pet. 25.[10] As

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[10] For this reason, the cases cited by Petitioners are inapposite. *See Watchtower Bible & Tract Soc'y of New York, Inc. v. Stratton*, 536 U.S. 150 (2002) (ordinance restricting door-to-door canvassing violated First Amendment because not narrowly tailored to village's stated interests); *Reno v. ACLU*, 521 U.S. 844 (1997) (federal statute prohibiting transmission of obscene, indecent or patently offensive material to persons under 18 years of age violated First Amendment because overbroad and not narrowly tailored to government's interests); *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530 (1980) (state order prohibiting inclusion of inserts discussing controversial policy issues in electric bills violated First Amendment because order not narrowly tailored to compelling state interest); *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727 (1996) (federal statute requiring operators of leased public, educational, or governmental TV channels to segregate and block "patently offensive" programming violated First Amendment because statute not appropriately tailored to achieve underlying objective); *Church*

Petitioners point out, this does not mean that conditions attached to the receipt of federal subsidies are "immune from First Amendment scrutiny." Pet. 16 (citing *Velazquez III*, 531 U.S. 533; *Rumsfeld v. Forum for Acad. & Inst'l Rights*, 547 U.S. 37 (2006); *Speiser v. Randall*, 357 U.S. 513 (1958)).[11] Rather, as discussed above, this Court has applied a "rational basis" test that asks only if the restrictions actually amount to a "wholesale prohibition" on the exercise of the constitutional rights, i.e., whether the restrictions leave the plaintiff with "adequate alternative channels of protected expression" outside the governmental program. *Velazquez II*, 164 F.3d at 765. Thus, a restriction associated with a governmental subsidy need not impose the least restrictive means in order to survive scrutiny under the unconstitutional conditions doctrine.

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of the Lukumi Babalu Aye, Inc. v. City Of Hialeah, 508 U.S. 520 (1993) (ordinance prohibiting animal sacrifice violated First Amendment Free Exercise Clause because not narrowly drawn to serve compelling government interest); *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992) (ordinance permitting government to set fee for assemblies and parades based on estimated cost of maintaining public order violated First Amendment because statute lacked adequate procedural safeguards and tied amount of fee to content of speech); *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (petitioner's conviction under statute criminalizing sale of obscene material violated Fourteenth Amendment because legislation not reasonably restricted to "evil with which it is said to deal").

[11] Nor does it mean that the government's interests are completely irrelevant. *Velazquez V*, 462 F.3d at 230 (collecting cases).

Petitioners cite *Velazquez III* for the proposition that "[f]unding restrictions may not be used to carry out . . . a viewpoint-based exercise in censorship." Pet. 27. But Petitioners overlook the fact that the restrictions at issue in this case, unlike the restriction this Court struck down in *Velazquez III*, are not viewpoint-based.[12] The welfare "suits for benefits" limitation at issue in *Velazquez III* precluded grantees from challenging the validity of the welfare system. Thus, the Court was concerned that since a challenge to a welfare law could arise for the first time in the middle of a case, the suit-for-benefits restriction might exclude certain speech from the courtroom. *Velazquez III*, 531 U.S. at 545, 546 (issue might not become apparent until "the midst of litigation proceedings" and the LSC attorney would be forced to withdraw from the representation). By contrast, the restrictions at issue in this case limit the types of cases LSC grantees may take on at the outset, not the types of arguments they may assert. Since the type of representation is generally evident when the representation commences, the concerns articulated in *Velazquez III* are not applicable.

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[12] Petitioners contend that the restrictions are viewpoint-based but offer no support for that argument. Petitioners merely make a baseless and circular contention that "[t]he lack of a legitimate justification for the requirement of physical separation compels an inference that the requirement is designed to deter disfavored speech." Pet. 26.

CONCLUSION

For the above-stated reasons, the petition for a writ of certiorari should be denied.

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